Jan 16 1877

Submitted

24-73

# TRANSCRIPT OF RECORD.

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## SUPREME COURT OF THE UNITED STATES.

No. 797.

THE UNITED STATES, APPELLANTS,

vs.

CYRUS C. CLARK.

APPEAL FROM THE COURT OF CLAIMS.

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**FILED OCTOBER 12, 1876.**

Jan 20 1877

Reversed [illegible]

Costs

# SUPREME COURT OF THE UNITED STATES.

## No. 797.

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1 Court of Claims of the United States.

Cyrus C. Clark
*vs.*
The United States.
No. 7158. Filed April 12, 1873. J. R.

To the honorable judges of the Court of Claims of the United States.

Respectfully shows Cyrus C. Clarke, of Middletown, in the State of Connecticut, a citizen of the United States, as follows, to wit:

That in the year 1865 he was a paymaster in the Army of the United States, and that on the sixth day of April, in that year, he was in the line of his duty as such paymaster, at Franklin, in the State of Texas; and did then and there in the line of said duty, lose by robbery, funds belonging to the United States, in his hands as such paymaster, to the amount of fifteen thousand nine hundred and seventy-nine dollars and eighty-seven cents, without any fault or negligence of this petitioner, which sum is now charged against him by the accounting-officers of the Treasury of the United States, wherefore your petitioner prays this honorable court to relieve him from responsibility for said loss.

Your petitioner further represents that he never gave any aid or comfort to the late rebellion against the Government of the United States nor to any person engaged therein, but did from the commencement to the close thereof consistently adhere to the United States.

Your petitioner further represents that he is as such paymaster held responsible to the Government on account of the loss of vouchers
2 without his fault or negligence, of the further sum of eleven hundred and seventy-five $\frac{84}{100}$ dollars, from which responsibility he also prays to be relieved by this honorable court.

CYRUS C. CLARKE.

Personally appeared the above subscribed Cyrus C. Clarke, and made oath that the facts stated in the above petition, he believes, are true; that no assignment or transfer of said claim has been made, and that the claimant is justly entitled to the relief therein claimed, after allowing all just credits and offsets, on this seventh day of April, 1873.

Before me.

[SEAL.] CURTIS THOMPSON,
*Notary Public in and for the State of Connecticut.*

Thomas H. Talbot,
*Solicitor for Petitioner.*

3 In the Court of Claims of the United States, December term, A. D. 1872.

C. C. Clarke
*vs.*
The United States.
No. 7158.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of seventeen thousand one hundred and fifty-five dollars and seventy-one cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

JOHN GOFORTH,
*Assistant Attorney-General.*

Filed June 4, 1873.

4 In the Court of Claims of the United States, December term, 1873.

CYRUS C. CLARKE
*vs.*
THE UNITED STATES. } No. 7158.

*Plea.*

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain his suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

JOHN GOFORTH,
*Assistant Attorney-General.*

Filed April 2, 1874.

5 In the Court of Claims.

CYRUS C. CLARK
*vs.*
THE UNITED STATES. } No. 7158.

At a Court of Claims held at the Capitol, in the city of Washington, on the 24th day of April, A. D. 1876, judgment was ordered to be entered as follows:

On due consideration of the premises the court finds that the petitioner, the said Cyrus C. Clark, was assistant paymaster in the military service of the United States during the year 1865, and that as assistant paymaster there came into his hands the sum of $15,979.87, and that said sum was stolen from the petitioner without fault or neglect on his part while in the line of his duty, and therefore do adjudge and decree that the said sum of $15,979.87 be allowed to the said Cyrus C. Clark by the proper accounting-officer of the Treasury as a credit in the settlement of his accounts as assistant paymaster.

By the court.

A true copy of record.

6 In the Court of Claims of the United States, Dec. term, 1875.

CYRUS C. CLARKE
*vs.*
THE UNITED STATES. } No. 7158.

From the judgment rendered in the above-entitled cause on April 24, 1876, in favor of claimant, the defendants, by their Attorney-General, on the 22d day of July, 1876, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
*Asst. Attorney-General.*

Filed July 22, 1876.

AT CHAMBERS.

Allowed.

C. D. DRAKE, *C. J.*

7 Court of Claims.

CYRUS C. CLARK
*vs.*
THE UNITED STATES.
No. 7158.

*Findings of fact.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 6th April, 1865, the claimant lost, by robbery while in the line of his duty as assistant paymaster in the Army at Franklin, Tex., a package of Government funds. The package was in his official safe at his quarters, and the loss was without fault or neglect on the part of the officer.

II. The claimant, after duly reporting the loss, and making known the facts to his superior officers, credited himself in his next account-current as follows: "Amount lost by robbery of safe at Franklin, Tex., $15,979.87." This item of credit was not acted upon by the accounting-officers of the Treasury until the final revision of his accounts, on the 6th November, 1871, when it was disallowed, and charged to him as a balance on hand.

III. The robbery was committed in the day-time, by forcibly breaking into the claimant's quarters, during his temporary absence, and then forcibly breaking into the Government safe, in which the funds were. Two persons were apprehended and tried by military commission held at the headquarters of the Department of New Mexico, on the 5th June, 1865, (upon the charges and specifications annexed.) On the trial the claimant was a witness, and testified as to the amount of the funds stolen. The commission found the prisoners guilty, (by the finding also annexed,) and the proceedings of the commission were duly approved, and the sentence of the commission carried into effect.

The claimant, at the time of the robbery, had no clerk or assistant. It appears, from other testimony, that a package of money was in the safe, but the precise amount thereof was known to no person but the claimant. He was of good character, personally and officially, and had always kept regular and exact accounts of the funds in his official custody, and had made due returns in regard to, and properly accounted for, the same. He immediately reported to his superior officers that the funds in that safe were $15,979.87, which was the amount of the loss appearing on his subsequent official reports, and charged against him as deficiency on the final revision and settlement of his accounts by the accounting-officers of the Treasury.

IV. On the 17th February, 1873, a suit was instituted by the United States, in the circuit court of the United States for the first circuit, on the official bond of said claimant, which suit is still pending, to recover the sum of $20,000, claimed to be due from him thereon.

8 *Court-martial record referred to in the preceding findings.*

HEADQUARTERS DEPT. OF NEW MEXICO,
*Las Cruces, N. M., June 5th,* 1865.

[General Orders No. 16.]

I. Before a military commission held at Franklin, Texas, on the 22d day of May, 1865, pursuant to Special Orders No. 14, par. 1, current series, from these headquarters, and of which Lieut. Col. Nelson H. Davis, assistant inspector-general, U. S. Army, is president, were tried:

1. THOMAS BOYLAN, (citizen.)

CHARGE 1.—"Burglary."

*Specification.*—"In this, that Thomas Boylan, (citizen,) did, with felonious intent, break, or assist in breaking, into the house occupied by Major C. C. Clark, additional paymaster, U. S. Army, by bursting the fastenings of one of the windows and entering therein, to the prejudice of peace and good order.

"This at Franklin, Texas, on or about the 6th day of April, 1865."

CHARGE 2.—"Grand larceny."

*Specification.*—"In this, that Thomas Boylan, (citizen,) did enter the house occupied by Major C. C. Clark, additional paymaster, U. S. Army, and did break or assist to break open an iron safe, and carry away the sum of fifteen thousand nine hundred and seventy-nine dollars and eighty-seven cents, more or less, which funds belonged to the United States, and for which Major C. C. Clark, additional paymaster, U. S. Army, is responsible.

"All this at Franklin, Texas, on or about the 6th day of April, 1875."

To which charges and specifications the prisoner pleaded "Not guilty."

FINDING AND SENTENCE.

The commission, after mature deliberation upon the evidence adduced, found the prisoner as follows:

Of the specification of the 1st charge, "guilty," except the words "break or assist," substituting therefor the words "aid and abet," and excepting the word "by," substituting therefor the words "and did aid and assist in bursting."

Of the 1st charge, "guilty."

Of the specification of the 2d charge, "guilty," except the word "enter," substituting therefor the words "aid and abet in entering," and excepting the words "did break or assist to break," substituting therefor the word "breaking," and substituting for the words "and carry away," the words "and did aid and abet in stealing therefrom and carrying."

Of the 2d charge, "guilty," and does therefore sentence him, Thomas Boylan, (citizen,) to be confined at hard labor in charge of a guard at any military post the department commander may direct, for the period of fifteen years, wearing a ball or weight of twenty-five pounds attached to his left leg by a chain five feet long."

2d. CASTORIO HERRERA, (Mexican citizen.)

CHARGE 1st.—"Burglary."

*Specification.*—"In this, that Castorio Herrera (Mexico citizen) did, with felonious intent, break, or assist in breaking, into the house
9 occupied by Major C. C. Clark, additional paymaster, U. S. Army,

by bursting the fastenings of one of the windows and entering therein, to the prejudice of peace and good order.

"All this at Franklin, Texas, on or about the 6th of April, 1865."

CHARGE 2nd. "Grand larceny."

*Specification.*—"In this, that Castorio Herrera (Mexican citizen) did enter the house occupied by Major C. C. Clark, additional paymaster, U. S. Army, and did break or assist to break open an iron safe containing Government funds, which safe was deposited in the house aforesaid, and did steal from the aforesaid safe and carry away the sum of fifteen thousand nine hundred and seventy-nine dollars and eighty-seven cents, more or less, which funds belonged to the United States, and for which Major C. C. Clark, additional paymaster, U. S. Army, is responsible.

"All this at Franklin, Texas, on or about the 6th day of April, 1865."

To which the prisoner plead "not guilty."

### FINDING.

The commission, after mature deliberation upon the evidence adduced, found the prisoner as follows:

Of the specification of the 1st charge, "not guilty."

Of the 1st charge, "not guilty."

Of the specification of the 2d charge, "not guilty."

Of the 2d charge, "not guilty," "and does therefore acquit him."

3d. LUIS MORALES, (Mexican citizen.)

CHARGE 1st.—"Burglary."

*Specification.*—"In this, that Luis Morales (Mexican citizen) did, with felonious intent, break, or assist in breaking, into the house occupied by Major C. C. Clark, additional paymaster, U. S. Army, by bursting the fastenings of one of the windows and entering therein, to the prejudice of peace and good order.

"This at Franklin, Texas, on or about the 6th of April, 1865."

CHARGE 2d.—"Grand larceny."

*Specification.*—"In this, that Luis Morales (Mexican citizen) did enter the house occupied by Major C. C. Clark, additional paymaster, U. S. Army, and did break or assist to break open an iron safe, containing Government funds, which safe was deposited in the house aforesaid, and did steal from the aforesaid safe and carry away the sum of fifteen thousand nine hundred and seventy-nine dollars and eighty-seven cents, more or less, which funds belonged to the United States, and for which Major C. C. Clark, additional paymaster, U. S. Army, is responsible.

"All this at Franklin, Texas, on or about the 6th day of April, 1865."

To which charges and specifications the prisoner pleaded "not guilty."

### FINDING AND SENTENCE.

The commission, after mature deliberation upon the evidence adduced, found the prisoner as follows:

Of the specification of the 1st charge, "guilty."

Of the 1st charge, "guilty."

Of the specification of the 2d charge, "guilty."

Of the 2d charge, "guilty," and does therefore sentence him, Luis Morales, (Mexican citizen,) "to be confined at hard labor in charge of the guard at any military post the department commander may direct, for the period of fifteen years, wearing a ball or weight of twenty-five pounds attached to his left leg by a chain five feet long."

10 II. The proceedings, findings, and sentences in the cases of

Thomas Boylan (citizen) and Luis Morales (Mexican citizen) are approved, and the sentences will be duly executed at Fort Craig, New Mexico.

The proceedings and findings in the case of Castorio Herrera (Mexican citizen) are approved. Herrera will be released from confinement.

III. The military commission, of which Lieut. Colonel Nelson H. Davis, asst. inspector-general U. S. Army, is president, is dissolved.

By command of Brig. General Carleton:

ERASTUS W. WOOD,
*Captain 1st Veteran Inf., California Vol.,*
*A. A. A. General.*

And, on the facts found, the Court of Claims decides as

*Conclusions of law.*

1. The court having ascertained the facts of the loss in this case, and that it was without fault or neglect on the part of the claimant, may render a decree in his favor as directed by the statute though the evidence of the amount of the funds lost was entirely circumstantial.

2. The suit having been brought within six years after the claimant's accounts were settled at the Treasury, in which he had charged the United States with the amount of the loss; and within six years after such item of credit for the funds so lost was first acted upon by the accounting-officers; and consequently within six years from the time when the officer was first held responsible for such loss, the suit is not barred by the statute of limitations, though more than six years elapsed between the loss and the bringing of the suit.

NOTT, J., delivered the opinion of the court:

It is unquestioned in this case that a loss occurred, that the loss was without fault or neglect on the part of the officer, and that no suspicions of fraud or collusion in the slightest degree cloud the claimant's case. Two points, however, have been raised, which have received the serious attention of the court.

The first of these is that the amount of the loss has not been positively proven. It has been shown by evidence that a package of money was in the paymaster's official safe, and that the safe was broken open and the package stolen; that the paymaster had counted and assorted those packages the day previous to the robbery; that he had no clerk or assistant at the time; and that no person save himself was cognizant of the amount of money which those packages contained. If a disbursing-officer were a competent witness for himself in such a case, this omission might be supplied in legal form. But it was determined in Christian's Case (7 C. Cls. R., p. 431) that he cannot be a witness on his own behalf to prove the contents of a captured package, being debarred both by the statute (Rev. Stat., 1079) and the common law. Two things, however, have been indisputably shown: first, that a loss occurred for which the claimant was not responsible and with which he should not be charged; second, that it is absolutely impossible to establish the precise amount of the loss by any positive proof. The resulting question on such facts is, Did Congress intend that an officer thus circumstanced should be charged with the full amount of the loss?

To answer this question in the affirmative would be saying that the remedy provided by the Disbursing-Officers Act is practically worthless, and that Congress really intended that the disbursing-officers of the

Government shall be answerable for losses over which they have
11 no control, and which no amount of human foresight could guard against. Disbursing-officers, from the nature of their official duties, must ordinarily be the only persons cognizant of the amount of public moneys in their possession. It would be official negligence were they to intrust the counting and assorting of such funds to unofficial hands; and were they to call in third persons, for their own protection, to witness the amounts in their possession, it would be a dangerous practice, inviting the robbery of large amounts, and violating all approved ideas of official prudence. Undoubtedly, the more completely a disbursing-officer conceals the amount of moneys in his hands, the more circumspectly he conducts his official business.

It appears in this case that the officer had funds in his possession to an amount exceeding those lost; that immediately after the robbery he notified the commanding officer of the post of the amount of money which was in the rifled safe; that he then reported the amount of the loss to his superior officer in the Pay Department; that he testified to it on the trial of the robbers, and that he charged it on his subsequent official returns and accounts. It also appears that he was a person of good personal and official character; that all of his returns and accounts had been accurate and free from error or suspicion, and that the amount claimed to have been lost was the only deficiency that occurred in his accounts after several years of service. If there were any other item of evidence which from the nature of things could be supplied, the court would require it to be produced, or throw the responsibility of its omission upon the claimant. But upon the facts proved we feel satisfied that this amount of funds was actually stolen, and that within the legislative intent an officer thus situated should receive a credit for that amount.

It is also to be noted that the statute does not require specific proof of the amount. After providing for the jurisdiction of the court in the first section, it goes on to say in the second, "That whenever said court shall have ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer, it shall make a decree." These are, indeed, all the "facts" which the court is specifically required to "ascertain." When these are ascertained, it is required to make a decree "setting forth the amount thereof, upon which the proper accounting-officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts." Congress manifestly intended that when, in a case like this, the main facts were ascertained of a loss on the one hand, and of freedom from fault or neglect on the other, the court should be as untrammeled as possible in "setting forth" in its decree the amount, which should not be left to the discretion of the auditing-officers.

The second point which has been raised by the counsel for the Government is the statute of limitations. Briefly stated, the facts upon which this question of the case must be decided are these: The loss occurred in April, 1865; the claimant credited himself with the amount, i. e., he charged the loss to the Government in his next account-current; this item of credit was not acted upon by the accounting-officers of the Treasury until the final revision of his accounts on the 6th November, 1871; and on the 12th April, 1873, the claimant brought this suit. The suit, therefore, was brought more than six years after the loss occurred, and less than six years after the item of loss or claim for credit was charged to the claimant at the Treasury.

The statute of limitations uses the word "claim," when defining the subjects as to which a suit may be barred by lapse of time, and the dis-

bursing-officers act also uses the word "claim" when defining
12 the subject as to which relief may be sought under its provisions.

But the statute of limitations forms a part of the amended Court of Claims act, (12 Stat. L., 765, § 10,) and that act existed before the disbursing-officers act, and the word "claims" in it has been defined by the Supreme Court to mean a money-demand on contract. Alire's case, (7 C. Cls. R., p. 28.) It is not to be doubted that subsequent subjects of jurisdiction would be subject to the provisions of the statute of limitations if they were in the nature of money-demands against the Government. But in the case now before us there is no debt owing from the Government to the claimant, and no money-demand asserted by the claimant against the Government. All the world over, statutes of limitation are intended for cases where one man owes a debt to another, which the latter has neglected to prosecute within a reasonable time. They are intended for the protection of the debtor, who cannot compel a suit against himself, and are applied against the creditor who has purposely delayed to bring the controversy to judicial determination. In this case, if there be any debt owing, it is from the claimant to the Government, and the anomaly is that it is the creditor, who has had a cause of action which might have been asserted at any time, who is insisting that the statute of limitations should exclude a decision upon the merits. It is evident here that the Government does not occupy the position of a debtor, and that it might have forced a judicial determination of the controversy at any time after the loss by bringing suit against the claimant upon the only existing cause of action. In view of these facts, and of the decision of the Supreme Court in Alire's case, we are inclined to hold that the statute of limitations is not applicable to this class of cases, and that the purpose of the disbursing-officers act was merely to secure the judicial ascertainment of a fact pending the settlement of an officer's accounts at the Treasury, so as to inform the accounting-officers, who have no means for the ascertainment of such facts, whether or not a particular credit should be allowed to the party. In harmony with this conclusion is the decision in Hall's case, (9 C. Cls. R., p. 270,) where it was held that if a disbursing-officer under compulsion pays over a deficiency found against him by the auditing-officers, and his account at the Treasury is settled and closed, it is too late for him to seek relief under the act; that the act limits such relief to losses "for which such officer was and is held responsible." Now, if the doctrine which the Government successfully maintained against a disbursing-officer in that case be law, and if the doctrine which it is now asserting against another disbursing-officer in this case be also law, it is apparent that disbursing-officers will not have the six years which the statute gives to creditors of the Government wherein to bring suits for relief, nor any definable time, and that, on the contrary, the Government will have the power to cut this period short whenever its officers think proper so to do. It does not seem consonant with the spirit of just legislation to say that Congress intended to impose the disability of the statute of limitations, and, at the same time, withhold the period which it expressly gives to those upon whom its disability may fall.

A decree will be entered, in the usual form, directing the proper accounting-officers of the Treasury to allow to the claimant, as a credit in the settlement of his accounts, for funds stolen from him at Franklin, Texas, April 6, 1865, the sum of $15,979.87.

**RICHARDSON, J.**, was absent when this case was decided, but took part in the consideration, and was of the opinion that judgment should be for the defendants, on the ground stated by him in Holman's case.

13 In the Court of Claims.

CYRUS C. CLARK
vs
THE UNITED STATES.
No. 7158.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the Attorney-General, for the defendants, for the allowance of an appeal, as filed in the clerk's office July 22, 1876; and of the order of the Chief-Justice of said court, allowing the same; of the findings of fact by the court, and conclusions of law thereon; and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this ninth day of October, A. D. 1876.

[SEAL.] JOHN RANDOLPH,
*Ass't Clerk Court of Claims.*

(Indorsement on cover:) No. 797. The United States, appellants, vs. Cyrus C. Clark. Court of Claims. Filed 12th October, 1876.

REC. 797—2

# In the Supreme Court of the United States.

OCTOBER TERM, 1876.

UNITED STATES, APPELLANTS,
*v.*
CYRUS C. CLARK.
No. 79~~8~~7.

APPEAL FROM THE COURT OF CLAIMS.

*Submitted under Rule XX.—Argument for Appellants.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1876.

UNITED STATES, APPELLANTS,
*v.*
CYRUS C. CLARK.
} No. 797.

APPEAL FROM THE COURT OF CLAIMS.

*Submitted under Rule XX.—Argument for appellants.*

## STATEMENT.

The petition of Mr. Clark, a citizen of Connecticut, omitting formal parts, is this:

"That in the year 1865 he was a paymaster in the Army of the United States, and that on the sixth day of April, in that year, he was in the line of his duty as such paymaster at Franklin, in the State of Texas; and did then and there, in the line of said duty, lose, by robbery, funds belonging to the United States in his hands as such paymaster, to the amount of fifteen thousand nine hundred and seventy-nine dollars and eighty-seven cents, without any fault or negligence of this petitioner, which sum is now charged against him by the accounting-officers of the Treasury of the United States; wherefore your petitioner prays this honorable court to relieve him from responsibility for said loss." (Record, 1.)

The authority for the action thus invoked is found in the act of May 9, 1866, c. 75, which gives the Court of Claims "jurisdiction to hear and determine the claim of any paymaster, * * * or other disbursing-officer of the United States, * * for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of Government funds, * * in his charge, and for which such officer was and is held responsible," with a right of appeal to this court "as in other cases." "Whenever said court shall have ascertained the facts of any such loss to have been without any fault or neglect on the part of any such officer, it shall make a decree setting forth the amount thereof, upon which the proper accounting-officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts."

14 Stats., 44; R. S., §§ 1059, item third, and 1062.

The Court of Claims upon the evidence found the facts to be as follows: (Record, 3.)

I. On the 6th April, 1865, the claimant lost, by robbery, while in the line of his duty as assistant paymaster in the Army at Franklin, Tex., a package of Government funds. The package was in his official safe at his quarters, and the loss was without fault or neglect on the part of the officer.

II. The claimant, after duly reporting the loss, and making known the facts to his superior officers, credited himself in his next account-current as follows: "Amount lost by robbery of safe at Franklin, Tex.,

$15,979.87." This item of credit was not acted upon by the accounting-officers of the Treasury until the final revision of his accounts, on the 6th November, 1871, when it was disallowed, and charged to him as a balance on hand.

III. The robbery was committed in the day-time, by forcibly breaking into the claimant's quarters, during his temporary absence, and then forcibly breaking into the Government safe, in which the funds were. Two persons were apprehended and tried by military commission held at the headquarters of the Department of New Mexico, on the 5th June, 1865, (upon the charges and specifications annexed.) On the trial the claimant was a witness, and testified as to the amount of the funds stolen. The commission found the prisoners guilty, (by the finding also annexed,) and the proceedings of the commission were duly approved, and the sentence of the commission carried into effect.

The claimant, at the time of the robbery, had no clerk or assistant. It appears, from other testimony, that a package of money was in the safe, but the precise amount thereof was known to no person but the claimant. He was of good character, personally and officially, and had always kept regular and exact accounts of the funds in his official custody, and had made due returns in regard to, and properly accounted for, the same. He immediately reported to his superior officers that the funds in that safe were $15,979.87, which was the amount of the loss appearing on his subsequent official reports, and charged against him as deficiency on the final revision and settlement of his accounts by the accounting-officers of the Treasury.

IV. On the 17th February, 1873, a suit was instituted by the United States, in the circuit court of the United States for the first circuit, on the official bond of said claimant, which suit is still pending, to recover the sum of $20,000, claimed to be due from him thereon.

The charges and specifications mentioned were substantially to the effect that the accused, Thomas Boylan, Castorio Herrara, and Luis Morales burglariously entered Major Clark's house, broke open the safe therein, containing Government bonds, and stole therefrom $15,979.87, "more or less." Boylan and Morales were convicted and Herrara acquitted.

Upon the facts found, the Court of Claims decided, as

### CONCLUSIONS OF LAW,

as follows:

1. The court having ascertained the facts of the loss in this case, and that it was without fault or neglect on the part of the claimant, may render a decree in his favor as directed by the statute, though the evidence of the amount of the funds lost was entirely circumstantial.

2. The suit having been brought within six years after the claimant's accounts were settled at the Treasury, in which he had charged the United States with the amount of the loss; and within six years after such item of credit for the funds so lost was first acted upon by the accounting-officers; and consequently within six years from the time when the officer was first held responsible for such loss, the suit is not barred by the statute of limitations, though more than six years elapsed between the loss and the bringing of the suit. (Record, 6.)

### ASSIGNMENT OF ERRORS.

The United States assign for error—

1. The decree rendered in favor of the claimant. (Record 2, folio 5.)

2. The legal conclusion that a decree may be rendered in the claimant's favor, where the only evidence offered of the amount of funds stolen (if any) was the letter or report of Maj. Clark to his [illegible] and his entry of the sum of $15,979.87 as an [illegible] account-current, which item was disallowed, [illegible] evidence of previous good character and unsuspec[illegible] correct, and prompt accounting. (Record, 3 and 6.)

3. The ruling that the statute of limitations did not bar the petition, although more than six years elapsed between the time of loss and that of filing the petition. (Record, 6.)

## BRIEF.

Two questions arise upon these facts and the legal conclusions drawn from them, viz: 1st. Is there sufficient *legal* evidence of the sum stolen from the safe in Major Clark's custody to entitle him to credit therefor; and, 2d. Is his claim, if originally valid, barred by the statute of limitations?

### 1.

As to the evidence of loss.

The act of June 25, 1868, c. 71, § 4—15 Stats., 75—enacts that "no plaintiff, or claimant, or any person from or through whom any such plaintiff or claimant derives his alleged title, claim, or right against the United States, or any person interested in any such title, claim, or right, shall be a competent witness in the Court of Claims in support of any such title, claim, or right, and *no testimony given by such plaintiff, claimant, or person shall be used.*"

It will be at once perceived that, in order to embrace every contingency, including one like the present, this section makes two provisions : *First*, that the claimant, &c., shall not be a competent witness in that suit. This shuts out oral statements or depositions, or any information derivable from him as a witness in his own behalf, relating to that issue. *Second*, that no testimony given anywhere, or deducible from statements of the claimant made before any other tribunal, or in the form of entries in books or accounts, shall be used in his own behalf.

That Major Clark could not testify, orally or by deposition, directly upon this issue, is too plain for argument; we are only left to consider whether the statute intended to leave an exception in favor of indirection. His bond was payable and his account adjustable here at the Treasury, where (if at all) this credit is to be allowed. Therefore the law here prevailing must govern. Cox *v.* U. S., 6 Peters, 203–4. Assuming that the statute meant to leave to claimants all the rights which parties and interested persons possessed at common law, this will not avail to admit the evidence, from which, as a legal conclusion, the judgment of the Court of Claims is drawn. If that foundation is removed, the judgment falls. The objection is not at all that the evidence was "circumstantial," but that the circumstances themselves were not admissible. If the facts or circumstances would not be received, the deduction drawn from them cannot support a judgment. Let us resort to the findings first, to learn precisely what the "facts" were, and then we can see how the legal conclusions and opinion of the majority of the court work them into the foundation of their judgment. The first fact is that the claimant met with *some* loss of Government funds, April 6, 1865, without fault or neglect on his part. This answers one requirement of the statute, exculpating Clark from fault or negligence, but an indefinite loss cannot be proved to obtain a definite credit. It is like proving a breach of contract without proving the damages, in which cases the law presumes them to be the smallest possible amount, merely nominal. "The jury cannot be asked to guess. They are to try the case upon *evidence*, and not upon conjecture." Leutz *v.* Choteau, 42 Penn. St., 438.

The second "fact" is that claimant reported the loss and (what he then, as now, claimed to be) the facts to his superior officers, and *credited* himself in his next account-current with the amount now claimed, $15,979.87.

The substance of this is that he wrote to some official of higher grade his version of the affair, and, in making up his account subsequently, put in $15,979.87 as an item of credit. How soon after the occurrence he wrote it does not appear, nor is it, perhaps, material. The Court of Claims give greater effect to this letter or report, *ex parte*, without opportunity for cross-examination, than to the sworn testimony of Major Clark; or, rather, give full effect to his written statement, while they will not (because they cannot) hear him upon oath! After all, this "report" is nothing more than his declaration in his own favor, which the common law never admitted in matters of account, with the insignificant and impertinent exception hereafter mentioned. There may be cases in which, as between third parties, official communications are admissible, but not in behalf of the writer, especially when written after the *lis mota* and for the express purpose of exculpating himself.

Where declarations are receivable, even *against* the party making them, they must not be a mere "narrative of a past occurrence;" if so, "they cannot be received as proof of the existence of such occurrence." 1 Greenl. on Ev., § 110; Lee *v.* Martin, 1 M. & Rob., 410; Johnson *v.* Sherwin, 3 Gray, 374. This is, as to declarations which are part of the *res gestæ*. Mr. Clark's letter was a narrative of what he supposed, or said, somebody else had done in his absence.

"The law of England recognizes no distinction between statements made by word of mouth and those made in writing, except where the writing is by deed." 1 Taylor on Ev., § 606.

One cannot put in his own letter, the contents of which have never been assented to by the recipient, any more than he can verbal declarations. Fearing *v.* Kimball, 4 Allen, 146.

It would be idle to cite authorities to the general proposition that one cannot, by way of letter or verbal declarations, manufacture evidence in his own behalf. This has been repeatedly declared in Maryland, as elsewhere, "an unbending rule of law." Hagan *v.* Hendry, 18 Md., 190; Whiteford *v.* Burckmyer, 1 Gill, 140; Nusbaum *v.* Thompson, 11 Md., 563; Nutting *v.* Page, 4 Gray, 581; Emerson *v.* Lowell, 6 Allen, 146; Ogden *v.* Peters, 15 Barb., 562; Devries *v.* Phillips, 63 No. Car., 208; Murray *v.* Cone, 26 Iowa, 278, 279.

"It is hard to perceive upon what ground the parties should give their private conversations, or correspondence with each other," &c. Freeborn *v.* Smith, 2 Wallace, 176.

Probably the Court of Claims would as readily assent to this abstract proposition as would this court or any other tribunal, and would agree, too, that the United States are to be treated precisely like any other party; but when it comes to make a practical application of these principles to a cause where loss will thereby be shifted from the Federal Treasury to private purses, we see another illustration of the remark that "hard cases make shipwreck of the law;" or, as the court expressed it in Winterbottom *v.* Wright, 10 Meeson & Wels., 116, "It is, without doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. *Hard cases are apt to introduce bad law.*"

It is obvious that, aside from Clark's own declarations, there is absolutely no evidence of the amount stolen, or that there was *anything* stolen. The other proof only establishes the breaking open of the safe; but if it be the fair result of probabilities that *some* funds were taken therefrom, nothing but Mr. Clark's own statement, long after the occurrence, made in one form or another, verbally, by letter, testimony in another cause, &c., even tends to determine the amount. Feeling the weakness of this, the court draws in other inconclusive circumstances, as if the aggregate force of many irrelevant facts could break through the law which would not admit one of them singly, forgetting the remark of one of the sages of the law, that "a hundred black rabbits don't make a black horse." One of these additional items is that Major Clark testified to this amount before the court-martial; to this, the general remarks about the admissibility of his declarations in his own favor are sufficient. If his direct testimony cannot avail, the reflex ought not to have any effect. "It also appears that he was a person of good personal and official character." We are not permitted to consult the original record to see whether or not the United States attacked him in either particular. If he was attacked, and vindicated himself to the satisfaction of the court, then he only succeeded in intrenching himself in that position which the law accords to every person, whether witness or party, in a cause civil or criminal, that every man is presumed to be innocent and honest until the contrary is proved; and every officer is presumed to do his duty until the reverse is shown. If his character was not assailed below, then the testimony or statement relative to it was inadmissible; admitted, like the other, contrary to all the rules of evidence, in order to avoid the bar of the statute excluding parties as witnesses. The same is true of the assumption that "all of his returns and accounts had been free from error or suspicion," and that this was the only deficit occurring in several years of service. In ordinary cases, would these facts be *evidence?* If not, it is apparent that the hardship of the case introduces bad law. That the Court of Claims was not quite satisfied with the probative force of all these irrelevant statements is clear from the next sentence of the opinion; "*If there were any other item of evidence which from the nature of things could be supplied, the court would require it to be produced or throw the responsibility of its omission upon the claimant.*" Why? If these so-called "items of evidence" establish the claimant's case, what need is there of more? If they do not, how is it to be sustained, simply because he has nothing better to offer? We shall see from the citations below how uniformly courts have refused to allow causes to be influenced by illegal testimony because, if the party ever had any other, he had been deprived of it by death or by operation of law. We think it advisable, in this connection, to reproduce the reasoning of the court, in its opinion, upon this point, as showing how it arrived at its conclusions of law, before commenting further and citing authorites relative thereto:

"Two points, however, have been raised, which have received the serious attention of the court. The first of these is, that the *amount* of the loss has not been positively proven. It has been shown by evidence that a package of money was in the paymaster's official safe, and that the safe was broken open and the package stolen; that the paymaster had counted and assorted those packages the day previous to the robbery; that he had no clerk or assistant at the time; and that no person save himself was cognizant of the amount of money which those packages contained. *If a disbursing-officer were a competent witness* for himself in such a case, *this omission might be supplied in legal form.* But it was determined in *Christian's Case* (7 C. Cls. R., p. 431) that he cannot be a witness on his own behalf to prove the contents of a captured package, being debarred both by the statute (Rev. Stat., 1079) and the common law. Two things, however, have been indisputably shown: first, that a loss occurred for which the claimant was not responsible and with which he should not be charged; second, that it is absolutely impossible to establish the precise amount of the loss by *any positive proof.*" * * *

"It appears in this case that the officer had funds in his possession to an amount exceeding those lost; that immediately after the robbery he notified the commanding officer of the post of the amount of money which was in the rifled safe; that he then reported the amount of the loss to his superior officer in the Pay Department; that he testified to it on the trial of the robbers, and that he charged it on his subsequent official returns and accounts. It also appears that he was a person of good personal and official character; that all of his returns and accounts had been accurate and free from error or suspicion, and that the amount claimed to have been lost was the only deficiency that occurred in his accounts after several years of service. *If there were any other item of evidence which from the nature of things could be supplied, the court would require it to be produced*, or throw the responsibility of its omission upon the claimant."

The foregoing quotation fully establishes my position that the court admitted testimony not generally receivable, solely because the party himself was not permitted to testify, and that the matter so received *all* came from the excluded party. To the admission of such testimony, from such motives, and for such a purpose, the courts have always been inflexibly opposed; and, if accepted here, it can only be because the Court of Claims is not bound, in its administration, by the ordinary legal rules of evidence, but may violate them to evade a statute, and because the United States is not entitled there to protect itself by those sanctions which everywhere else afford a shield to private litigants against claims easily simulated and almost impossible to be disproved.

We do not mean to intimate that, in this case, the claim is false; but that, because of apparent hardship in it, the barriers of the law ought not to be broken down, and thus expose us to ficticious claims hereafter.

Upon the subject now under discussion the court of South Carolina said: "It is, however, contended that as the witness could not be examined as to the point in question, his declarations might be given in evidence. But certainly it does not follow that, merely because a person cannot be sworn, his declarations can be given in evidence. *A person who is interested* or infamous cannot be sworn as a witness, neither can his declarations be admitted. *It would be extraordinary if a person's declarations, not upon oath, should be admitted as evidence whose oath would not be received.*" Nettles *v.* Harrison, 2 McCord, 232, top.

The language employed upon the next pages (233, 234) of that report is responsive to the suggestion of the Court of Claims, that there is no other evidence which the claimant can produce. After remarking that the reason why hearsay is excluded is because the person is not on oath, and cannot be cross-examined, it proceeds: "The rule of law that where the best evidence cannot be had, the next best may be received, must not be carried too far. Secondary evidence may be received, but *not that which is incompetent.* Thus, for instance, if an original deed is lost, a copy may be given in evidence; if a copy cannot be had, extracts from it may be received, and if extracts cannot be had, you may give parol evidence of its contents; but that is as far as the rule can be extended. Hearsay, or the declarations of a person as to its contents, cannot be admitted; and *if a person cannot establish his case by competent testimony he must fail.*" * * "*The circumstance of not being able to prove it in any other way will not authorize the introduction of incompetent testimony.*" (2 McCord, 233, 234.)

To the same effect, the court of Vermont. "The argument is not sound, which has been urged, that because she cannot be examined as a witness, therefore her declarations, made when she was not under oath, may be given in evidence. The same argument might be urged in favor of receiving the admissions or declarations of any one who was dead, or who from any reason was rendered incapable of testifying in the case." (Churchill *v.* Smith, 16 Vt., 563.)

"That Harris was dead did not make his writings evidence against Starke, any more than his unsworn declarations would have been evidence." (Crump *v.* Starke, 23 Ark., 135.)

"It is certainly a very odd reason for receiving the evidence of what a child has said, that the child is not capable of taking an oath." (Rex *v.* Nicholas, 2 Car. & Kir., 248.) The evidence was complete, *aliunde*, that the child, six years old, had been violated; there, as here, the *corpus delicti* was proved; but, though the child was deemed too young to understand the nature of an oath, her declarations to her mother as to the guilty person were not admitted. So in Rex *v.* Brasier, 1 Leach's Crown Law, 200.

In Kentucky suit was brought for money collected by the defendant for the plaintiff. The defense was that the defendant had been robbed of it without his fault. To support this defense he offered to prove by several witnesses his own appearance, conduct, and declarations only a few hours after the alleged robbery, and also offered to testify in his own behalf; all which testimony the court excluded as incompetent, and gave such instructions to the jury that a verdict and judgment were rendered for the plaintiff. The court say: "As the law does not allow a party to make evidence for himself, the appellant's conduct and declarations were not admissible to prove that he had been robbed of the appellee's money; nor could he, according to our civil code, be competent to prove the alleged robbery." (Tucker *v.* Hood, 2 Bush, 86.)

"A person holding bank-notes, which he alleges have been burned, cannot prove his declarations at the time of the fire, to establish the loss. Nor can such person be admitted to prove that he had a bundle of bank-notes which were burnt, and state their general amount as the foundation of his recovery." The court say: "The evidence is inadmissible. To admit it would be to allow a rogue to set fire to some box, papers, &c., and by simply declaring that he had burnt a note upon an individual, to make that evidence of the existence and destruction of the note upon which to recover. * * * The party cannot be a witness in his own case. From necessity, he is sometimes admitted to the court on the preliminary question as to a paper being lost, in order to open the door for lesser proof than the paper or its contents. Here you propose to prove by the party the existence of the bills, their destruction and general contents, *as to amount only. It is not proof of a collateral, preliminary fact, but of the main facts in issue. It is urged upon the ground of necessity*, though the necessity is of a kind within the power of a party to create at his pleasure, when he inclines to make himself a witness in his own case. It would open the door to rank injustice *so to change the law of evidence*." Burridge *v.* The Geauga Bank, Wright, 688. The plaintiff was nonsuit. These two last cases present as strong appeals to favor upon the ground of personal hardship as does the one at bar, but the court could not listen. In the last, Mr. Burridge lost his house and its contents by fire; yet he had to bear the loss of these bills, which was so much positive gain to the bank, because he could only prove the loss by his own testimony. All we ask is, that the United States may have the same law measured to them as is meted to the citizen. If the statute of exclusion works hardship, or operates unjustly or unsatisfactorily, that is a consideration for the legislature; and it will be the sooner remedied if rigidly enforced; or Congress can grant special relief to this petitioner.

When the Court of Claims say that "if there were any other item of evidence which from the nature of things could be supplied, the court would require it to be produced," they must be understood to mean "in the nature of things" peculiar to this case; for there is nothing which makes it naturally impossible, generally speaking, to furnish the evidence, which is lacking in this case by reason of the claimant's incompetency. In truth, his clerk had been discharged but a few days before the robbery. We do not perceive how spoliation would be any more invited by permitting the amount on hand to be known than by permitting strangers to observe that he had packages of unknown amount placed in his safe. *Ignotum pro magnifico.* Yet this fact he did establish by extraneous testimony. After all, the simple proposition is that, because he cannot prove the essential fact of his whole claim by legal evidence, he may do so by that which is generally incompetent.

This court said in Mima Queen *v.* Hepburn, 7 Cranch, 295, "that hearsay evidence is incompetent to establish any specific fact, which is in its nature *susceptible* of being proved by witnesses who speak from their own knowledge." It is of no consequence that the fact is generally difficult and often impossible to be proved, by lack of a *competent* witness, possessing requisite knowledge; the test is whether or not it is, *in its nature*, "*susceptible* of being proved by witnesses who speak from their own knowledge." The reasoning of this court in that opinion is further applicable to the cause at bar, since the motives for excluding hearsay are, in many respects, the same as for shutting out declarations. Speaking of the character of the claim then urged, and of the deep and anxious interest naturally attaching to it, (a suit for freedom,) this court say: "However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted." * * * * * "It was very justly observed by a great judge that 'all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence [and that of interested persons] is, in its own nature, inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence [and that of interested persons] is totally inadmissible." Noticing that there are some exceptions, as to pedigree, &c., the court continues: "It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye-witnesses to that fact are dead [or incompetent.] But if other cases, standing on similar principles, should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence [or declarations] is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all. If the circumstance that the eye-witnesses of any fact be dead [or incompetent] should justify the introduction of testimony to establish that fact from hearsay [or by his declarations,] no man could feel safe in any property, a claim to which might be supported by proof so easily obtained." 7 Cranch, 295, 296. Especially if the proof is that which the party to be benefited thereby may manufacture at pleasure.

The Court of Claims do "perceive a distinction between the assertion of this and of any other right." They say: "It is also to be noted that the statute does not require specific proof of the amount," but says "that whenever said court shall have ascertained the facts of any such loss to have been without fault, &c., it shall make a decree, setting forth the amount thereof," &c. They are, by the first section of the act, given "jurisdiction to hear and determine the claim," &c. Jurisdiction is the power "to hear and determine." When vested by statute in a court, it must mean the power to hear and determine according to law and the ordinary course of procedure in courts. And when a court is to ascertain facts as the basis of a judgment, those facts must be made certain by him upon whom rests the burden of proving, according to law and evidence, as usually administered, those essential statements which he has made in his declaration of his case. The second section of the enactment in question is really intended only to indicate the form of judgment, and the method of making it avail-able for the benefit of the officer, and to make it obligatory upon the accounting-officers of the Treasury to respect and carry into effect the decree rendered, if favorable to the disbursing-agent whose accounts are to be affected thereby. But if intended as a further direction to the court about "ascertaining the facts" of a loss, the *amount* of such loss must be one of the facts to be ascertained. In such cases, as in all other litigation, it is *the* vital fact to be established, toward which all the efforts of the parties tend. Everything else is subsidiary and subordinate to this, and useless unless this sum is at last "determined." Then this principal "fact" ought certainly to be the one of all others to be established conformably to the law of the land and agreeably to the regular, well-known principles of evidence; to receive what that court declares it entitled to, a "judicial ascertainment." (Record, 8.)

In this part of its opinion the Court of Claims truly declares the purpose of this act to be " to secure the judicial ascertainment of a fact pending the settlement of an officer's accounts at the Treasury;" but we doubt whether it was simply "so as to *inform* the accounting-officers, *who have no means for the ascertainment of such facts*, whether or not a particular credit should be allowed to the party." (Record, 12, middle.) It was not merely for the *information* of the Treasury, but for its actual guidance, and to control its action in the premises. The appellate right to this court was not given from a tribunal acting as an advisory board, but as a *court;* hence, to act upon law and evidence as courts do. It is true that the accounting-officers of the Treasury "have no means" for ascertaining, by legal testimony, supported by effective oaths, and tested by cross-examination, the facts of such a case, which is sufficient cause for referring it to a court; but it is obvious that if the court is to base its action and "hear and determine" the cause, and fix the amount, only upon those written reports of the officer, which were before the accounting-officers, and upon those accounts-current which are sent to that Department, then nothing is gained by the transfer, but we have simply left the matter to men comparatively unacquainted with such accounts in place of those perfectly familiar with them; whereas the change gives the benefit of experience, if the claim is to be investigated just as other litigated issues are.

If Congress intended by this legislation that this subject of loss and "the amount should not be left to the discretion of the auditing officers," it is not natural to suppose that it meant to leave it to the discretion of the court, "untrammeled" by law or uncontrolled by evidence—*legal* evidence—to fix the amount. The plain effect of the statute, as we construe it, is to remove the subject, so far as these statutory provisions operate, from the domain of discretionary power. It may be true that the accounting-officers of the Treasury cannot now, even if satisfied that a sum in the hands of a disbursing-agent has actually been lost or destroyed by fire, or flood, or capture, or otherwise, allow it to him, as sufficiently accounted for by full proof of such destruction; or it may be that to this extent, the matter must still "be left to the discretion of the auditing-officers." But if these functionaries, in what seems to them a doubtful case, or for any reason, decline to exercise this discretion, (which must exist in everybody entitled to settle private accounts, as they are ordinarily settled,) in favor of the paymaster, &c., he can then appeal to the court, where his claim—made by him in the one side, and denied by the Treasury officials upon the other—may be submitted to a court, to be tested, heard, and determined by those rules of law and principles of evidence which the experience of generations has found to be most useful in eliciting the truth of doubtful and controverted issues. Congress did not intend to take this subject of the amount, a vital point, from the discretion of one set of men, and those familiar with the course of the business, solely to confide it to the discretion of other men, whose ordinary official functions were judicial. Lord Camden has told us, in forcible language, what judicial discretion is. It was to take away from any person, by the exercise of such power, the opportunity to conclusively exclude an item of a paymaster's account that this law was enacted; that the same law which controls the lives and fortunes and interests of other citizens might govern as to these persons and this subject. We honestly believe that so far as the Court of Claims substitutes an unknown, casual, and capricious discretion for those principles of legal evidence which "are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life," they frustrate not only the purposes of this statute, but those for which the court itself was ordained. "*Optima lex quæ minimum relinquit arbitrio judicis; optimus judex qui minimum sibi.*"

One remark more: The Court of Claims would not have made the suggestion that they considered themselves free to fix the amount "untrammeled" by the ordinary rules of law and evidence, had they not felt these trammels and been conscious that, if limited by established and well-defined principles, they had nothing whatever, in the nature of legal evidence, by which to determine the amount. It was owing to this consciousness that Major Clark's own declarations were substituted for testimony, together with his unsupported entry of $15,979.87 in an account-current, while the common law confined proof of cash items to mercantile book accounts, made at the time and in the ordinary course of business, and supported by the trader's suppletory oath, to items of forty shillings, or $6.67; which rule still applies where parties are not witnesses. (Kelton *v.* Hills, 58 Maine, 114.) A second verdict in this last-cited case was set aside, because the defendants were allowed to testify, (Kelton *v.* Hills, 59 Maine, 261,) the court concluding its opinion with the trite observation that "a statute authorizing a man to be a witness in his own case is in derogation of the common law, and must be construed strictly," citing Warner *v.* Fowler, 8 Md., 25. Then, certainly, there ought to be no relaxation for the purpose of indirectly injecting into the record the party's statements, which the statute, in conformity with the common law, expressly prohibits him from making as a witness, where they can be subjected to the ordinary tests of truth.

As the record shows that there was not one scintilla of proof of the amount of the loss, properly receivable, to determine and adjudicate upon it wholly upon incompetent testimony was an error of law.

Judge Richardson dissented from the decision in this case. A reference to his opinion in the Holman case shows that the ground of his dissent is that there is no proof of the amount lost.

"The difficulty in this case is to ascertain what is due, and, in the absence of proof to that effect, a nonsuit was proper." (Teal *v.* Auty, 2 Brod. & Bing., 101.)

## II.

### THE STATUTE OF LIMITATIONS.

Upon this the Court of Claims say:

"The second point which has been raised by the counsel for the Government, is the statute of limitations. Briefly stated, the facts upon which this question of the case must be decided are these: The loss occurred in April, 1865; the claimant credited himself with the amount, *i. e.*, he charged the loss to the Government in his next account-current; this item of credit was not acted upon by the accounting-officers of the Treasury until the final revision of his accounts on the 6th November, 1871; and on the 12th April, 1873, the claimant brought this suit. The suit, therefore, was brought more than six years after the loss occurred, and less than six years after the item of loss or claim for credit was charged to the claimant at the Treasury.

"The statute of limitations uses the word 'claim' when defining the subjects as to which a suit may be barred by lapse of time, and the *Disbursing-Officers Act* also uses the word 'claim' when defining the subject as to which relief may be sought under its provisions. But the statute of limitations forms a part of the *Amended Court of Claims Act*, (12 Stat. L., 765, § 10,) and that act existed before the *Disbursing-Officers Act*, and the word 'claims' in it has been defined by the Supreme Court to mean a money-demand on account. *Alire's Case*, (7 C. Cls. R., p. 28.) It is not to be doubted that subsequent subjects of jurisdiction would be subject to the provisions of the statute of limitations if they were in the nature of money-demands against the Government. But in the case now before us there is no debt owing from the Government to the claimant, and *no money-demand asserted by the claimant* against the Government. All the world over, statutes of limitation are intended for cases where one man owes a debt to another, which the latter has neglected to prosecute within a reasonable time. They are intended for the protection of the *debtor*, *who cannot compel a suit against himself*, and are applied against the creditor, *who has purposely delayed to bring the controversy to judicial determination.* In this case, if there be any debt owing, it is from the claimant to the Government; and the anomaly is, that it is the creditor, who has had a cause of action which might have been asserted at any time, who is insisting that the statute of limitations should exclude a decision upon the merits. It is evident here that *the Government does not occupy the position of a debtor*, and that it might have forced a judicial determination of the controversy at any time after the loss by bringing suit against the claimant upon the only existing cause of action. In view of these facts, and of the decision of the Supreme Court in *Alire's Case*, we are inclined to hold that the statute of limitations is not applicable to this class of cases, and that the purpose of the *Disbursing-Officers Act* was merely to secure the *judicial* ascertainment of a fact *pending the settlement of an officer's accounts* at the Treasury, so as to inform the accounting-officers, *who have no means for the ascertainment of such facts*, whether or not a particular credit should be allowed to the party. In harmony with this conclusion is the decision in *Hall's Case*, (9 C. Cls. R., p. 270,) where it was held that if a disbursing-officer under compulsion pays over a deficiency found against him by the auditing-officers, and his account at the Treasury is settled and closed, it is too late for him to seek relief under the act; that the act limits such relief to losses *for which such officer was and is held responsible.* Now, if the doctrine which the Government successfully maintained against a disbursing-officer in that case be law, and if the doctrine which it is now asserting against another disbursing-officer in this case be also law, it is apparent that disbursing-officers will not have the six years which the statute gives to the creditors of the Government wherein to bring suits for relief," &c. (Opin., Record, 7, 8.)

Unless we greatly deceive ourselves, the fallacy of this course of reasoning, by which the Court of Claims was brought to the "conclusion of law" it promulgated upon this point, is quite obvious.

The language of the statute is very general: "That *every claim against the United States, cognizable by the Court of Claims*, shall be forever barred" unless the petition is filed "*within six years after the claim first accrues.*" 12 Stats., 767, c. 92, § 10; R. S., § 1069.

We do not see how Alire's case, (1 Ct. of Clms., 233; 7 *ib.*, 28, and 6 Wall., 573,) the only one cited by the court or by claimant's counsel in support of the position taken, at all affects the question. The *sole* question there was whether or not the Court of Claims had jurisdiction over the *subject*, *i. e.*, over the issuing of a land-warrant; here, the jurisdiction is indisputable; if it has jurisdiction, then the case being "cognizable" by it comes within the plain terms of the statute. Whatever claim it is authorized to hear and determine must be filed within six years from the time it first accrues. The language employed by this court in Alire's case must be interpreted with reference to the subject then under discussion. It was in this connection that it said, (6 Wallace, 576, top,) "Yet it is quite clear that *the limited power given to render a judgment* necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a *moneyed demand* as due from the Government." As the law then stood, the court would have no jurisdiction over a claim like this of Major Clark's; but when brought by subsequent statute within its cognizance, the ordinary bar of the limitation act applies.

The remark made by this court was, in substance, that the whole statute creating the Court of Claims must be taken together; and that the word "claim" was limited by the power to give judgment, and so a claim for a land-warrant to issue could not be considered by that tribunal. It simply defined what constituted a claim, within the meaning of *that* act. The generality of the word "claim" was confined by the language of the whole section to a moneyed demand; but the term "claim cognizable by the Court of Claims," in a different statute, relating to limitations, is subject to no further qualification.

The court continue, (as above quoted:) "It is not to be doubted that subsequent subjects of jurisdiction would be subject to the provisions of the statute of limitations if they were *in the nature of money demands* against the Government; but in the case now before us there is no debt owing from the Government to the claimant, and *no money demand asserted by the claimant against the Government.*"

Major Clark's claim is "*in the nature*" of a money demand, if it is not such a demand; it is, in effect, a precise equivalent to such claim.

The relation of debtor and creditor exists between Major Clark and the United States.

He was intrusted with an amount of funds of which this sum of $15,979.87 was part, and became a debtor to the United States therefor, as well as an agent for its proper disbursement. The amount was rightfully charged to him upon the accounting-books of the Treasury, and he and his sureties became responsible, bonded debtors, therefor. This debt and responsibility could only be extinguished by legally and properly accounting for the funds placed in Major Clark's hands. Anterior to and independently of the statutory provisions now under discussion, it would be no answer to the governmental claim, and no satisfaction of the debt due to it, that any portion of this money had been stolen from his custody, even without fault on his part. United States *v.* Prescott, 3 Howard, 578; Muzzy *v.* Shattuck, 1 Denio, 233; State *v.* Harper, 6 Ohio St., 607; State *v.* Township, 28 Ind., 86; Hancock *v.* Hayward, 12 Cush., 112; and Halbert *v.* State, 22 Ind., 125; where it was held that this liability was not discharged by keeping the public funds in the safe specially purchased and provided by the county board for that purpose. The reasons for this strictness are thus stated by Gibson, C. J., in Com. *v.* Comly, 3 Penn. St., 374, and are equally applicable to require stringent proof in the cause at bar: "The opinion of the court in the case of the United States *v.* Prescott is founded in sound policy and sound law." * * * "True, there are many cases of relief against a legal right arising out of a contract; not one of which however, bears even a remote resemblance to the present. *I know not of a single instance of a relief for hardship produced by misfortune in the superinducement of which the party insisting on his right had no agency.*" * * * (Allusion to tenant's obligation to rebuild.)

* * * "A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim to relief, one would be apt to think, than a loss by robbery, *which is always preceded by a greater or less degree of negligence.* A receiver, or his surety, would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case; and *his discretion, were he at liberty to use it, would be influenced by considerations of general policy.*" (3 Penn. St., 374.)

Our purpose in referring to this liability in this connection, however, is to remark that the officer's bond creates a "moneyed demand" in favor of the United States against him, constituting him a debtor for all the funds intrusted to him. So, "in the case now before us," (Opin., Record, 8, tenth line,) there *is* a debt owing from the claimant to the Government, unless it can be offset by this claim, "in the nature of a money demand," "asserted by the claimant against the Government." The use to be made of the decree, if sustained, is to cancel a fair, *bona-fide* debt, for so much money received under bonded contract; hence, the claim is in effect a money demand. It is to be used as and for money.

"Who has purposely delayed to bring the controversy to judicial determination?" (Opin., Record, 8, lines 16 and 17.) The opinion here discloses, we respectfully submit, a misapprehension as to what "the controversy" is, which is to be judicially determined. Major Clark and his sureties confessedly owe the Government for moneys received by him and not disbursed according to law; there was no occasion to sue the bond to establish this liability. It could not be denied, *nor released*, in an action upon the bond, unless a decree had *first* been obtained in the Court of Claims, establishing the amount of the loss by robbery, without fault or neglect on the part of the paymaster; and his right to such a decree is the only controversy between these parties. In other words, the determination of this issue in the Court of Claims should precede any suit on the bond, and not the suit be brought to compel action in the Court of Claims. Before suing the bond, it would be eminently proper for the Government to wait a reasonable time—the full statute period of six years, if you please—before putting the bond in suit, to see if the principal obligor could, by legal proof, establish his claim to equitable consideration (or to the indulgence granted by law, rather) in the appropriate tribunal If he could, action on the bond might become unnecessary.

If we are right, then, the claimant should be the motor; he is the one "who has purposely delayed to bring the controversy to judicial determination."

However established and to be used, his claim, in substance and effect, is simply one of set-off, and should be regulated by the rules of proof and of limitation which govern such demands. They are everywhere subject to be barred by lapse of the same term of years which would defeat a direct action upon the claim. (Angell on Lims., 75, § 74; Walker v. Clemens, 15 Q. B., 1046; Ruggles v. Keeler, 3 Johns., 260; Hinckley v. Walters, 8 Watts, 260; Levering v. Rittenhouse, 4 Whar., 130;

Watkins v. Harwood, 2 G. & J., 307; Trimyer v. Pollard, 5 Grat., 460; Harwell v. Steele, 17 Ala., 372; Moore v. Lobin, 26 Miss., 304; Nason v. McCulloch, 31 Maine, 158.)

The main question, then, as we view it, is *when did this claim first accrue?*

The loss occurred April 6, 1865. Only the state of facts existing upon that day can be considered in determining whether Major Clark's claim should be allowed or rejected, if entitled to be heard upon its merits. Therefore, we say, his claim, such as it is, and whatever it may be, accrued upon that day. If entitled to have any sum disbursed by him credited upon his account, he is so entitled as of the day when such disbursement was made, whenever the date becomes material; nor can it make any difference in this respect whether the diminution of funds in his hands was caused by a loss for which he was not legally responsible, or by a payment which he was authorized to make.

The Court of Claims, however, in its second "conclusion of law," (Record, 6,) holds a different view. It fixes the date for his claim to accrue by ascertaining and adopting that at which this item of credit claimed was first acted upon by the accounting officers and rejected in the adjustment of his account; which was Nov. 6, 1871. (Record 3, finding 11;) "*and consequently*" that this suit was brought *within six years from the time when the officer was first held responsible for such loss*," and is, therefore, not barred by the statute of limitations. (Record, 6.)

The conclusion of law is inaccurately expressed, where it speaks of Major Clark's first becoming responsible for the loss. He never became responsible *for the loss*, strictly speaking. He became responsible *for the funds* intrusted to him from the moment he received them; such is the grammatical as well as the legal construction of the language of the first section of this statute; and he continues so responsible from that day to this, unless he has since been discharged, as to any portion of them, in a manner authorized by law, namely, by having, within the period designated for the establishment of such a claim in the proper court, filed his petition there, setting forth that the loss was without fault on his part. Here a marked distinction is to be noticed. An authorized payment discharges him, *pro tanto*, from the moment it is made; and if sued upon his bond, he has only to prove the payment to the satisfaction of the jury; but if a part of the public funds have been lost or stolen, he cannot discharge himself as to them, even if he fully satisfy a jury that the loss was without his fault or neglect. The law does not say that such an officer shall not be held for funds so lost; but that if the Court of Claims, after ascertaining the facts, render such a decree, he shall have credit to that amount. It is their decree which alone can avail him. His "claim" to it, to be so used, is one originally exclusively cognizable by that court; and so, precisely within the terms of the statute limiting the time within which such claims shall be filed therein. The case is anomalous, for the decree is to be obtained in a court, for use before a Department; and no other tribunal whatever, upon the same state of facts, can grant any relief. His claim, then, is to a decree; and that claim arises and depends upon the facts to be proved, and accrues whenever these facts, showing due diligence and freedom from fault, occurred; not from the time when the item first received consideration at the hands of the Treasury officials. A judgment or decree is that which is sought by every suitor in court; and his right to demand it accrues the moment that *fact* occurs upon which is based his right of action, though he may delay instituting his suit, if he please; but will be barred if he permit the whole period of limitation to elapse between the occurrence of those facts upon which his action is founded and the date of its institution.

Hall's case (9 Court of Claims, 270) was indubitably decided correctly; but it affords no support to that rendered in the present case. It determined that an officer who had fully paid the balance stated against him upon account at the Treasury, and was no longer "responsible" to the United States for public moneys intrusted to him, because all accounted for, was not entitled to relief under this act. It merely gave to the fact of a voluntary payment its well-known legal effect. The reasoning of the court in the case at bar, (Record 12, just below the middle,) with reference to Hall's case, is so far correct, that if any officer voluntarily pays, within six years, a sum claimed of him, which he might have been relieved from under this statute, his own act, not that of the Government, cuts short the period of application for this remedy. The present opinion inadvertently misstates an essential element of Hall's case; probably because the justice announcing this judgment took no part in the hearing of that cause. He states that it was there held that "if a disbursing-officer *under compulsion* pays over a deficiency found against him," &c., "it is too late for him to seek relief under the act;"

whereas reference to 9 Court of Claims, 275, at the close of the opinion, shows that the court found "there is no averment that the payment was made under protest, and *for aught that appears it was wholly voluntary.*" Be-sure, toward the bottom of the preceding page (274) it is said that the *petition* avers circumstances which were claimed to amount to "moral duress;" but the above-quoted sentence states that the *proof* indicated nothing but a payment "wholly voluntary." At any rate, in speaking of compulsion as affecting legal rights and remedies, reference must be had to *legal* compulsion; and as Drake, C. J., there says, (p. 274,) there is no such coercion known to the law as "moral duress." Such considerations as are set forth in Hall's petition may constitute the *motive* for his action; but they operate argumentatively upon his will, and not by force of legal compulsion; so that, after all, it is a voluntary payment; an abridgment by his own deliberate election to pay rather than to seek relief or allowance. Even if it were true that, in order to insure a prompt and regular adjustment of accounts at the Treasury, an officer might sometimes be deprived of his full six years to apply under this statute, that would not conclusively determine this question, which is not whether the officer may not sometimes have less than six years to assert his claim, but whether he is entitled to more. The only compulsion the Treasury officials can ever apply must be a legal one; and no court will deny an officer, using due diligence, the opportunity to apply for relief, if he desires to make the application.

Every motive which induces the passage of acts of limitation applies with unusual force to cases like the present.

It is that of a public bonded officer, entrusted with public funds, for which he knows he is bound to account rigidly according to law and the terms of his bond. He seeks to escape this responsibility not by showing that the fruits of taxation have been used for some governmental pupose, by which the whole people are benefited, but that they have gone to support in a life of idleness and crime, those whose existence is a danger to our institutions and a menace to all government. The fact of such a diversion of the funds, never occurring (as C. J. Gibson says) without *some* degree of negligence, must be known at the time of its occu rrence, and can then be established more easily than at any later period, so as to ascertain whether or not it was by the fault of the officer. It is for him who seeks the relief to take the initiative by making application for it. He can *at once* apply for and obtain his decree (if entitled to it) so as to cause no delay in the settlement of his account; and should be held to act at least within the customary period of limitation, rather than to wait ten years before applying to the court. "The very fact of acqusiescence or forbearance *in him who has refrained to institute his claim* is in itself a strong presumption that it was the result of a consciousness on his part that the claim is unfounded, or at least extremely questionable." Ang. on Lims., 8. This author says (p. 6) that "judges of court both in England and in the United States, have, in very many instances, emphatically characterized statutes of limitations as statutes of repose; though it must be admitted that in too many instances in both countries, by the astuteness of lawyers, *and the too inconsiderate construction of courts*, they have been in danger of becoming statutes of controversy." In his celebrated speech of February 7, 1828, upon law-reform, Lord Brougham successfully called upon his associates "to prop the main pillar of security against stale and unjust demands, the statute of limitations;" declaring that "to thwart the design of the legislature [in originally passing it] *the courts have been setting up their rules of presumption.*"

This accusation cannot truthfully be made against the Supreme Court of the United States, which has given this statute its intended effect as a statute of repose, and watched the action, in this respect, of those courts over which it exercises supervisory power; declaring that the statute imposes "a salutary vigilance;" McCluny *v.* Silliman, 3 Peters, 279; and is, therefore, "entitled to the same respect with other statutes and *ought not to be explained away;*" Clementson *v.* Williams, 8 Cranch, 74; because "the best interests of society require that causes of action should not be deferred an unreasonable time." The most elaborate discussion *per* Story, J., is found in Bell *v.* Morrison, 1 Peters, 360 *et seq.* And in Leffingwell *v.* Warren, 2 Black, 606, it was enforced, though it was conceded that "the equities in behalf of the plaintiff below are strong. We have all felt their force. Without fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust, the remedial power lies with the legislature and not with this court." In the case at bar, if injury arise from delay, it is wholly the fault of the petitioner.

The case of the United States *v.* Curtis, cited by claimant, has no more to do with the one at bar than Tenterden Steeple had with Goodwin Sands. That was upon the bond of one Holman, whose claim for credit had been disallowed by the Court of Claims. The only issue was as to *interest;* and Judge Clifford ruled that this did not begin to run until the account was adjusted at the Treasury Department; applying what he understood to be the law that there can be no interest upon a *balance* of account until that balance is ascertained and assented to by the parties, or otherwise shown to have been accurately fixed.

It stated a general conclusion of law as to the liability for interest upon accounts-current, and did not at all relate to a statutory claim, in the Court of Claims, for a credit if one was there judicially ascertained and certified.

EDWIN B. SMITH,
*Assistant Attorney-General.*

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# Supreme Court of the United States.

October Term, 1876.

**No. 797.**

THE UNITED STATES, Appellants,

*v.*

CYRUS C. CLARK.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR APPELLEE.

CHARLES E. PIKE,
*Counsel for Appellee.*

# Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 797.

THE UNITED STATES, APPELLANTS,

*v.*

CYRUS C. CLARK.

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APPEAL FROM THE COURT OF CLAIMS.

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## BRIEF FOR APPELLEE.

### STATEMENT OF THE CASE.

The defendant in error in this suit petitions the Court of Claims for a credit for the sum of $15,979.87, which it is alleged he lost in the line of his duty and without fault on his part while acting as additional paymaster in the army, and which amount was disallowed by the accounting officers of the Treasury Department.

Transcript of Record, pp. 1, 3.

The statute upon which the petition is founded is as follows: —

" *Be it enacted, etc.:*

" That the Court of Claims shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of government funds, vouchers, records and papers in his charge, and for which such officer was and is held responsible; *Provided*, That an appeal may be taken to the Supreme Court, as in other cases.

SECT. 2. That whenever said Court shall have ascertained the facts of any such loss to have been without fault or neglect on the part of any such officer, it shall make a decree, setting forth the amount thereof, upon which the proper accounting officers of the treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his account."

14 *Stat. at Large*, p. 44.

The Court of Claims ascertained the facts to have been as alleged by the claimant, and decreed a credit for the amount claimed.

Record, p. 3.

They also found that the petition was filed less than six years after the item of loss was disallowed, and after the commencement of the suit upon the petitioner's official bond, though more than six years after the loss occurred.

Record, pp. 3, 6.

## POINTS OF LAW.

### I.

The decree of the Court below is conclusive as to all the facts involved in that decree, and the evidence upon which it is founded will not be considered in this Court.

Regulations of the Supreme Court in the Matter of Appeals from the Court of Claims, Rule I.
Hoar *v.* Goulding, 116 Mass. 132.

When the justices of the Court below act as jurors, their findings "upon all facts and inferences of fact are conclusive, as if determined by a verdict."

Backus *v.* Chapman, 111 Mass. 386.

And especially does this rule hold good in the class of cases to which this belongs, and in view of the special power, in this regard, conferred upon the Court below.

Opinion of Court of Claims, in Record, p. 7.

## II.

The statute of limitations is not applicable to the class of cases mentioned in the act hereinbefore recited.

1. The several provisions of the act of 1862 (including that of limitation in section 10) are to be restricted to those claims in which the petitioner sets up a money demand as due from the government, and which pass into judgment as prescribed in section 7, act of 1855, and section 7, act of 1863.

10 Stat. at Large, 612.
12 " " 765.
Alire's case, 6 Wall. 573.
Record, p. 7.

2. The intent of the statute of 1866 (14 Stat. at Large, p. 44) is to enable the disbursing officer to establish, through the Court of Claims, a defense to the demand of government. To require that matter in defense should be proved before proceedings for recovery are instituted, or any act is done, or intimation given, that claim will be made, is without precedent, and cannot have been contemplated by Congress.

"That must be the truest exposition of a law which best harmonizes with its design, its objects, and its general structure."

**Dwarris on Stat., p. 178.**

3. To contend that the statute of limitations is applicable is to admit that the claimant is entitled to the full six years after the cause of action accrues. But the government has heretofore insisted that claimants in such cases are not entitled to the six years within which to file their petitions, if the government sees fit to press the matter to payment (by suit on official bond or otherwise) before the lapse of that time, and such has been the decision of the Court of Claims.

Hall's case, 9 C. of Cls. R. 270.
Opinion of Court, Record, p. 8.

## III.

The statute of limitations, if applicable at all, does not begin to run at the time of the loss. It can only begin to run after there has been an official determination that the disbursing officer is held responsible for the amount of the loss. Before that time he can have no standing in Court as a claimant for relief; for there is nothing from which he can ask relief.

1. Such officer becomes responsible for all moneys received at the time of their receipt, and not at the particular dates when he parts with the several amounts claimed as credits in his accounts rendered.

It is immaterial at what time payments are made or losses incurred, so far as responsibility for the money is concerned. The officer has already incurred that responsibility by the fact of receiving the money, and by the terms of his official bond.

3 Stat. at Large, 397.

2. It becomes thereafter his duty to state the items of disbursement, and submit his vouchers, or otherwise account for moneys received; and, having done so, his present immediate obligation is discharged.

3. It is then the duty of the accounting officers to examine all items claimed as credits, and the proofs sustaining them, and to determine for what sums the officers shall be discharged from responsibility, as having been properly disbursed. or excusably lost, and for what balance they shall still be "held responsible."

In this decision is involved the question of "responsibility on account of losses." If adverse to the claimant, it is equivalent to a decision that he is still "held responsible" for the amount of the loss.

(4) This is the holding to responsibility contemplated by the statute. When the claimant invokes the aid of the Court of Claims in this behalf, he must not only show a loss, but also that his claim for a credit on account of it has been examined and disallowed by the accounting officers; in other words, that he is still "held responsible" for the amount of the loss.

The existence of this last fact is as important as the other; and before it is established he has no cause of complaint, and therefore no standing in Court.

Hall's Case, 9 C. of Cls. R. 270.
Record, p. 8.

(5) This view is supported by a late decision of Mr. Justice Clifford in the First Circuit, in the case of *The United States* v. *Curtis et als.* [not yet reported].

In that case a suit was brought upon the official bond of Oliver Holman, late additional paymaster United States Army; and upon a balance admitted to be due, interest also was claimed from the time said Holman rendered his final account, namely, Nov. 30, 1865.

One of the conditions of the bond was that Holman and his heirs, etc., should "regularly account when thereunto required for all moneys received by him from time to time as paymaster as aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and also refund at any time when thereto required any public moneys remaining in his hands."

It appeared that on said Nov. 30, 1865, Holman's account showed nothing due to the United States; " but it did show that he had charged to the United States the sum of $2,658 for money stolen from his custody. Subsequently, to wit, on March 18, 1872, the accounting officers settled his account, and having rejected that charge, found that he owed $3,320.02 to the United States."

Claim for interest was made under sect. 3,624 of the Revised Statutes (p. 719). But the Court held that it did not apply, " for the reason that the accounts of the delinquent principal were not then settled, and of course no balance had been reported against him, for which the sureties were responsible. There was then no delinquency, either of principal or surety, as neither one nor the other had been requested to refund."

In like manner in the present case, Clark had regularly accounted for all moneys in his possession. No balance had been reported against him until Nov. 6, 1871, and he was not " held responsible " for any balance until that time. (Transcript of Record, p. 3.) It was not therefore obligatory upon him, nor was it permissible for him, to commence proceedings in the Court of Claims until he was so " held."

To adopt any other conclusion would be to treat the examination and decision of the accounting officers as a useless form, to make the words of the statute in that regard of no effect, and to compel the claimant to enter upon a defence before it could be known that any claim would be set up against him, or any defence would be required.

Respectfully submitted,

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